

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

1. W. A. DREW EDMONDSON, in his)
capacity as ATTORNEY GENERAL OF)
THE STATE OF OKLAHOMA and)
OKLAHOMA SECRETARY OF THE)
ENVIRONMENT, C. MILES TOLBERT,)
in his capacity as the TRUSTEE FOR)
NATURAL RESOURCES FOR THE)
STATE OF OKLAHOMA)
PLAINTIFF)
vs.) CV-0329-JOE-SAJ
)
1. TYSON FOOD, INC.,)
2. TYSON POULTRY, INC.,)
3. TYSON CHICKEN, INC.,)
4. COBB-VANTRESS, INC.,)
5. AVIAGEN, INC.,)
6. CAL-MAINE FOODS, INC.,)
7. CAL-MAINE FARMS, INC.,)
8. CARGILL , INC.,)
9. CARGILL TURKEY PRODUCTION)
LLC,)
10. GEORGE'S, INC.)
11. GEORGE'S FARMS, INC.)
12. PETERSON FARMS, INC.,)
13. SIMMONS FOODS, INC., and)
14. WILLOW BROOK FOODS, INC.)
DEFENDANTS)
)
TYSON FOODS, INC., TYSON)
POULTRY, INC., TYSON CHICKEN,)
GEORGE'S, INC., GEORGE'S FARMS,)
INC., PETERSON FARMS, INC.,)
SIMMONS FOODS, INC., AND)
WILLOW BROOK FOODS, INC.)
)
THIRD PARTY PLAINTIFFS,)
)
vs.)
)
CITY OF TAHLEQUAH, et.al.)
)
Third Party Defendants)

ANSWER AND COUNTERCLAIM TO THIRD PARTY COMPLAINT

COMES NOW, Jo Nan Allen, attorney for Third Party Defendant, the City of Watts and answers the Third Party Complaint as follows:

Regarding, I. BACKGROUND, Third Party Defendant, City of Watts (hereinafter “Watts”) is without sufficient knowledge of the background and the same are denied.

1. Watts is without sufficient knowledge of the allegations in the first sentence of Paragraph 1 and the same is denied. Watts admits that the State of Oklahoma has filed a complaint alleging the action and damages described in Sentence 2, 3, 4, 5, and 6.

2. Watts is without sufficient knowledge of the allegation in the first sentence of Paragraph 2, and the same is denied. Watts denies that the second sentence, third sentence, and the fourth sentence. Watts also denies the fifth sentence which is the accordingly sentence.

3. Watts denies Paragraph 3.

4. Watts denies the first sentence of Paragraph 4 applies to Watts and questions the numerous allegation in the rural northeast of Oklahoma. Watts is without sufficient knowledge of the second sentence of Paragraph 4 and the same is denied. Watts admits the third sentence of Paragraph 4.

5. Watts is without sufficient information of paragraph 5 of the first and second sentence and the same is denied. Watts admits the third sentence of Paragraph 5.

6. Watts is without sufficient information of the first sentence, second sentence and third sentence of paragraph 6 and the same is denied.

7. Watts is without sufficient information of the first sentence, second sentence and third sentence of Paragraph 7 and the same is denied.

8. Watts is without sufficient information of the first sentence in Paragraph 8 and the same is denied. Watts admits the second sentence of Paragraph 8.

9. Watts is without sufficient information of the first, second, third or fourth sentences in Paragraph 9 and the same is denied.

II. Parties

10. Watts is without sufficient information of Paragraph 10 and neither admits or denies Paragraph 10.

11. Watts is without sufficient information of Paragraph 11 and neither admits or denies Paragraph 11.

12. Watts is without sufficient information of Paragraph 12 and neither admits or denies Paragraph 12.

13. Watts is without sufficient information of Paragraph 13 and neither admits or denies Paragraph 13.

14. Watts is without sufficient information of Paragraph 14 and neither admits or denies Paragraph 14.

15. Watts is without sufficient information of Paragraph 15 and neither admits or denies Paragraph 15.

16. Watts is without sufficient information of Paragraph 12 and neither admits or denies Paragraph 16.

17. Watts is without sufficient information of Paragraph 13 and neither admits or denies Paragraph 17.

18. Watts is without sufficient information of Paragraph 14 and neither admits or denies Paragraph 18.

III. Third Party Defendants

19. Watts is without sufficient information of Paragraph 19 and neither admits or denies Paragraph 19.

20. Watts is without sufficient information of Paragraph 20 and neither admits or denies Paragraph 20.

21. Watts denies Paragraph 21 by specifically denying the first sentence as the city does not discharge sludge but only discharges waste water which tests the same as the water in the Illinois River. This waste water also supports and maintains a healthy thriving shad population, which is more than some areas of the Illinois River can maintain. Watts does not discharge sludge, because a properly maintained lagoon system will have complete digestion and there will be no sludge to dispose. The current city council can testify and Oklahoma DEQ who is in charge of compliance can also explain that for several years there has been no disposal of sewage sludge.

Watts denies the second sentence as they do not have the hay rights to the land and recently the parties that do have hay rights applied commercial fertilizer to improve the hay quality. This application of commercial fertilizer has occurred since the law suit was filed. There was no application before the law suit was filed.

Watts denies the third sentence of Paragraph 21 as they maintain a normal lagoon and do not participate in land application operations.

Watts denies the fourth sentence of Paragraph 21 as the operations in the lagoons do not reach the river. See test results of Cell Three that were completed in 1998 and shown as Exhibit

A.

Watts denies the fifth sentence of paragraph 21.

22. Watts is without sufficient information of Paragraphs 22 through 169 and neither admits or denies Paragraphs 22 through 169.

23. Watts specifically denies Paragraph 170.

IV. Jurisdiction and Venue

24. Watts admits the first sentence of Paragraph 171. Watts denies the second sentence and states that a normal lagoon is maintained under Oklahoma DEQ rules and regulations. Watts denies the third sentence as they have no acts or omissions that would require a law suit to be brought against Watts. Watts denies the fourth sentence as they have not contributed to the Illinois River problems and are not a responsible party. Watts admits that the Court has jurisdictional over the issues of this case, but denies any liability as a defendant.

25. Watts admits jurisdiction in Paragraph 172, but denies any activity on property in Oklahoma that would cause any liability.

26. Watts admits that the Illinois River Watershed is situated in the Northern District, but denies the third party claims alleged in paragraph 173.

27. Watts is without sufficient information of paragraphs 174 through 195 to admit or deny.

28. Watts denies Paragraph 196.

29. Watts admits Paragraph 197 and asserts that Watts is not responsible for or contributed to any pollution in the Illinois River.

30. Watts is without sufficient information in paragraph 198 and 199 regarding Westville and Tahlequah to admit or deny notice against those cities, but do admit notice was made against Watts and that Watts did not respond.

31. Watts denies Paragraph 200 as it applies to Watts.

32. Watts denies Paragraph 201 as it applies to Watts.

33. Watts is without sufficient information of Paragraph 202 and neither admits or denies the Paragraph.

34. Watts denies Paragraph 203.

35. Watts is without sufficient information of Paragraph 204 and neither admits or denies the Paragraph.

36. Watts denies Paragraph 205.

37. Watts denies Paragraph 206.

38. Watts denies Paragraph 207 as it applies to the City of Watts as a Third Party Defendant.

39. Watts denies Paragraph 208 as it applies to the City of Watts as a Third Party Defendant.

40. Watts denies Paragraph 209 and further alleges that it has not released any hazardous substances.

41. Watts denies Paragraph 210, denies any releases, any tests or other activities it would be responsible for and denies any responsibility for any damages to the Defendant.

42. Watts denies Paragraph 211, denies any responsibility for paying for future response costs of Third Party Plaintiffs.

43. Watts is without sufficient information of Paragraph 212 and neither admits or denies the Paragraph.

44. Watts is without sufficient information of Paragraph 213 and neither admits or denies the Paragraph.

45. Watts is without sufficient information of Paragraph 214 and neither admits or denies the Paragraph.

46. Watts denies Paragraph 215.

47. Watt denies Paragraph 216 and any liability for respective share of damages.

48. Watts is without sufficient information of Paragraph 217 and neither admits or denies the Paragraph.

49. Watts is without sufficient information of Paragraph 218 and neither admits or denies the Paragraph.

50. Watts denies Paragraph 219 and any responsibility for release of some of the same constituents of poultry liter. See Exhibit A.

51. Watts denies Paragraph 220.

52. Watts denies Paragraph 221 as it applies to the City of Watts. They deny that that Watts should be responsible for any injunctive relief, clean-up, assessment or remediation efforts.

53. Watts denies the Prayer for Relief and asks that the Court award attorney fees and costs for having to defend this lawsuit.

AFFIRMATIVE DEFENSES

54. Watts, Third Party Defendant further asserts that Watts is entitled to the defenses of estoppel, laches, failure to timely file, contributory negligence, assumption of risk and that Third Party Plaintiff has failed to state a claim upon which relief can be granted and further asserts any other affirmative defenses available from facts developed during discovery.

55. Wherefore, Third Party Defendant, the City of Watts, prays that Third Party Plaintiffs take nothing on their Petition and that the Third Party Defendant, the City of Watts be awarded reasonable attorney fees and costs.

COUNTER CLAIM

56. Third Party Defendant, the City of Watts for the Counter Claim, adopts and repleads the Answer and defenses herein and alleges that the Third Party Plaintiffs have created a nuisance, trespassed on the Illinois River and filed a frivolous law suit against the City of Watts.

57. Third Party Plaintiff's have created a nuisance by impairment of the Illinois River in the Watts area. This intentional invasion, unreasonable impairment has hurt the economic growth of the Watts area by impairing use of the river and enjoyment of the river and the surrounding area.

58. Third Party Plaintiff's have caused an unreasonable and substantial danger to the public's health and safety including the river in the Watts vicinity. Such conduct constitutes a nuisance and this ongoing nuisance is both temporary and permanent.

59. Exhibit A. demonstrates that Watts since before January of 1998 have had cleaner waste water than the water in the Illinois River and that the pollution of the water in the Illinois River is a tragedy to Northeastern area of Oklahoma and the Illinois River watershed.

60. Upon request, the City Clerk of Watts has forwarded all information requested by the Third Party Plaintiffs, and they have filed this frivolous lawsuit that with the information and knowledge that the City of Watts is not contributing to the degrading of the Illinois River or its watershed.

Therefore the City of Watts requests damages for nuisance, trespass and filing a frivolous lawsuit and all attorney fees and costs of defending this lawsuit and all other and further relief as it is just and appropriate.

City of Watts, Third Party Defendant

/s/ Jo Nan Allen
Jo Nan Allen OBA#17563
219 W. Keetoowah
Tahlequah, OK 74464
Phone: (918) 456-8603
Fax: (918) 456-1407
E-Mail: jonanallen@yahoo.com

Dated: January 24, 2006.

CERTIFICATE OF SERVICE

I certify that on the 24th day of January, 2006, I mailed a copy of the Answer and Counter claim to the following

W. A. Drew Edmondson
Attorney General
State of Oklahoma
2300 North Lincoln Blvd
Ste 112
Oklahoma City, Ok 73105
Counsel for Plaintiffs

J. Randall Miller
David P. Page
Louis W. Bullock
Miller Keffer and Bullock
222 S. Kenosha
Tulsa, OK 74120-24120-2421
Counsel for Plaintiffs

Douglas Allen Wilson
Melvin David Riggs
Richard T. Garren
Sharon K. Weaver
Riggs Abney Neal Turpen Orbison and
Lewis
502 West 6th Street
Tulsa, OK 74119-1010
and
Robert Allen Nance
Dorothy Sharon Gentry
Riggs Abney
5801 N. Broadway, Ste 101
Oklahoma City, OK 73118
Counsel for Plaintiffs

State of Oklahoma
3800 North Classen
Oklahoma city, OK 73118,
Counsel for Plaintiffs

John H. Tucker
Theresa Noble Hill
Rhodes, Hieronymus, Jones, Tucker and
Gable
P. O. Box 21100
Tulsa, OK 74121-1100
**Counsel for Cargill, Inc., and Cargill
Turkey Production, LLC**

C. Miles Tolbert
Secretary of the Environment

Robert P. Redemann
Lawrence W. Zeringue
David C. Senger
Perrine, McGivern, Redemann, Reid, Berry

and Taylor, PLLC
P. O. Box 1710
Tulsa, Ok 74101-1710
**Counsel for Cal-Maine Farms, Inc. And
Cal-Maine Foods, Inc.**

Elizabeth C. Ward
Frederick C. Baker
Motley Rice, LLC
28 Bridgeside Blvd.
Mount Pleasant, SC 29464
and William H. Narwold
Motley Rice LLC
20 Church St., 17th Floor
Hartford, Ct 06103
and
Robert E. Sanders
E. Stephen Williams
Young Williams, PA.
P. O. Box 23059
Jackson, MS 39225-3059
**Counsel for Cal-Maine Farms, Inc. And
Cal Maine Foods, Inc.**

R. Thomas Lay
Kerr, Irvine, Rhodes and Ables
201 Robert S. Kerr Avenue, Ste 600
Oklahoma City, Ok 73102
**Counsel for Defendant Willow Brook
Foods, Inc.**

Randall E. Rose
George Owens
The Owens Law Firm, P.C.
234 West 13th Street
Tulsa, OK 74119
**Counsel for Defendant George's Inc. And
George's Farms, Inc.**

A. Scott McDaniel
Chris A. Paul
Nicole M. Longwell
Philip D. Hixon
Martin A. Brown
Joyce, Paul and McDaniel, P.C.
1717 South BoulderAve., Suite 200
Tulsa, Ok 74119
**Counsel for Defendant Peterson Farms,
Inc.**

Stephen L. Jantzen
Patrick M. Ryan
Ryan, Whaley and Coldiron, P.C.
119 N. Robinson
900 Robinson Renaissance
Oklahoma City, OK 73102
**Counsel for Defendants Tyson Foods,
Inc., Tyson Poultry, Inc., Tyson Chicken,
Inc., and Cobb-Vantress, Inc.**

John R. Elrod
Vicki Bronson
Conner and Winters, P.C.
100 West Center Street, Ste 200
Fayetteville, AR 72701

and

Daniel Richard Funk
Bruce Freeman
Conner and Winters, P.C.
15 East 5th Street, Ste 3700
Tulsa, Oklahoma 74103-4344
**Counsel for Defendant Simmons Foods,
Inc.**

Thomas C. Green
Mark D. Hopson
Jay Thomas Jorgensen
Timothy K. Webster
Sidley Austin Brown and Wood LLP
1501 K. Street NW
Washington, DC 2005
**Counsel for Tyson Foods, Inc., Tyson
Poultry, Inc., Tyson Chicken, Inc. And
Cobb-Vantress, Inc.**

/s/ Jo Nan Allen

Jo Nan Allen OBA#17563

219 W. Keetoowah

Tahlequah, OK 74464

Phone: (918) 456-8603

Fax: (918) 456-1407

E-Mail: jonanallen@yahoo.com

Stilwell

AREA DEVELOPMENT AUTHORITY

4 EAST WALNUT * STILWELL, OK * 74960

FAX (918) 696-4572

PH. (918) 696-5084

January 28, 1998

Gary Fain
Watts Waste Water Dept.
P.O. Box 70
Watts, OK 74964

Re: Explanation of tests performed.

Dear Mr. Fain:

There seems to be some misunderstanding on the bench sheets of lab analysis which was performed on samples (Sx's) collected at both the Watts Lagoon and the Illinois River and were faxed to your department on January 22, 1998. This letter is an attempt to explain that data in a way that will end any misunderstanding.

The following information may be in greater detail than is necessary, however, with me not knowing the expertise in the water and waste water field of your department, I feel it necessary to answer as simply as possible. I apologize in advance if it is in greater detail than needed.

On January 16, 1998, per the request of Mr. Lonnie Walker, Watts employee, Gary Eubanks and I, both certified through DEQ as Operators and Lab Technicians, came to Watts and collected Sx's from the Illinois River and one of the Watts Lagoons. The following information is the results of the tests performed according to the 18th edition of Standard Methods and some explanations of the data.

1. BOD: Biochemical Oxygen Demand is a test required by government agencies to be performed on waste water to determine the amount of oxygen needed to "break-down" the impurities by bacteria in water in a controlled environment and is recorded as milligrams per liter BOD (mg/l), or parts per million BOD (ppm), which basically means the same thing. (One mg/l is equal to one ppm).

EXHIBIT A

The BOD on the River Sx was 3.175 ppm.
Which means that out of a million parts of water only 3.175 parts was BOD.
In other words if we were dealing in dollars, out of \$1,000,000 only \$ 3.18 is BOD.
This is next to nil.

The BOD in the Watts Lagoon Sx was 3.625 ppm.
Which means that the Watts Lagoon had only 0.45 ppm more than the River.
Again, this is next to nil.

2. TSS: Total Suspended Solids is a test performed to determine the amount of solids, either settleable or in suspension, in water recorded also as mg/l or ppm.

The TSS in the River Sx was 19.87 ppm, while the Watts Lagoon Sx had 8.27 ppm.
In other words the Watts Lagoon had less TSS than did the River Sx.

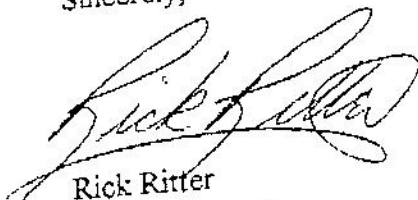
This scenario continues with the other lab analysis performed (except for DO and pH). You can subtract the Watts Lagoon Sx data from the Illinois River Sx data and compare that to a million parts and see that the differences are inconsequential compared to the whole.

3. DO: Dissolved Oxygen is the amount of oxygen contained in the Sx.
The DO in the River Sx was 11.8 ppm while the DO in the Watts Lagoon Sx was 9.9 ppm.
To give you a comparison, most marine life must have at least 4.0 ppm DO to survive.
Both are well above this amount.

4. pH: pH is a measurement of the acidity or alkalinity (base) of water. It is measured in Standard Units (SU's) and has a scale that runs from 0 to 14, with 7.0 being neutral. Anything below 7.0 is on the acidic side and everything above 7.0 is on the alkaline side. A good rule of thumb to remember is that all waters that inhabit marine life should be in the 6.0 to 9.0 range.
Both the River Sx and the Watts Lagoon Sx are well within this range.

I hope this information is helpful to you without being too simple. However, if you need further information, or if I can be of further assistance, please don't hesitate to call.

Sincerely,



Rick Ritter
Plants Manager

Stilwell

AREA DEVELOPMENT AUTHORITY

PH. (918) 696-5084

FAX (918) 696-4572

March 4, 1998

Mr. Gary Fain
Watts Utility Dept.
P.O. Box 70
Watts, OK 74964

Re: Results and explanation of testing done by the Stilwell Area Development Authority's Wastewater Lab.

Dear Mr. Fain:

According to your request, Mr. Lyndon Black and I visited Watts on February 26, 1998. We collected samples for analysis at the Illinois River, the Watts Lagoon, and the Watts Lift Station. Following are the results of the tests done along with some explanations.

1. BOD (Biochemical Oxygen Demand expressed in ppm, parts per million):
Listed below are the BOD test results on the three sample sites, however, we should note that BOD tests should have a minimum depletion of dissolved oxygen of 2.0 ppm. When the strength of the sample is unknown, predetermining the amount to use is hard. The BOD sample on the Illinois River and the Watts Lagoon did not deplete the desired 2.0 ppm. Nevertheless, I believe the information to be accurate enough to decide the differences in the two samples.

Watts Lift Station BOD	= 254.5 ppm	
Watts Lagoon BOD	= 5.13 ppm	(removal = 98%)
Illinois River BOD	= 2.83 ppm	

The Watts Lagoon experienced a 98% removal of BOD as compared with the Lift Station. This is very good. We can easily see only a 2.3 ppm difference between the Illinois River sample and the Watts Lagoon. Westville, Watts' closest neighbor, to my knowledge has a permit through the ODEQ and the EPA to discharge a daily average of 20 ppm BOD. Knowing this, we can easily determine that if Watts' Lagoon should accidentally discharge, the Illinois River would not see a negative environmental impact.

2. TSS (Total Suspended Solids expressed in ppm, parts per million):

Watts Lift Station TSS	= 156 ppm	
Watts Lagoon TSS	= 6 ppm	(removal = 96%)
Illinois River TSS	= 63 ppm	

The Watts Lagoon experienced a 96% removal of TSS as compared with the Lift Station. This also is very good. Please notice that the Watts Lagoon has less TSS than does the Illinois River. According to literature that I have read it is common for lagoons to have less TSS than their receiving streams. It is plain to see that an accidental discharge from the Watts Lagoon would not be detrimental to the Illinois River on TSS.

3. Nitrogen, Ammonia (NH_3):

Watts Lift Station	= 32.76 NH_3
Watts Lagoon	= 0 NH_3
Illinois River	= 0 NH_3

No measurable amount of NH_3 was found in either the Watts Lagoon or the Illinois River. Therefore they would not see any negative impact should an accidental discharge occur.

4. Alkalinity

Watts Lift Station	= 310 ppm
Watts Lagoon	= 90 ppm
Illinois River	= 66 ppm

Since an alkalinity of less than 100 ppm is desirable for waters used for domestic purposes, Watts Lagoon, if accidentally discharged, would not negatively affect the Illinois River.

5. Chlorides

Watts Lift Station	= 149 ppm
Watts Lagoon	= 52 ppm
Illinois River	= 41 ppm

Common levels of chlorides range between 2 ppm and 100 ppm. The Watts Lagoon and the Illinois River both are in this range. Therefore, the Illinois River would not experience a negative environmental impact should the Watts Lagoon accidentally discharge.

6. pH (expressed in SU, standard units)

Watts Lift Station	= 8.58 SU
Watts Lagoon	= 7.83 SU
Illinois River	= 7.62 SU

A pH of 7.00 Standard Units is considered neutral with anything above a pH of 7.00 showing alkalinity. Both the Watts Lagoon and the Illinois River are on the alkaline side. Most natural waters have pH values of between 5.5 and 8.6. Most EPA NPDES permits allow pH ranges from between 6.0 and 9.0 on discharging systems. Again, the Illinois River would not experience a negative environmental impact should the Watts Lagoon accidentally discharge.

7. D.O. (Dissolved Oxygen)

Watts Lift Station	=	5.0 ppm
Watts Lagoon	=	10.3 ppm
Illinois River	=	9.6 ppm

We can plainly see that the D.O. content of the Lagoon is higher than the D.O. content of the Illinois River. This is good. Again, no negative environmental impact.

8. Phosphorous

Watts Lift Station	=	3.3 ppm
Watts Lagoon	=	0.231 ppm
Illinois River	=	0.231 ppm

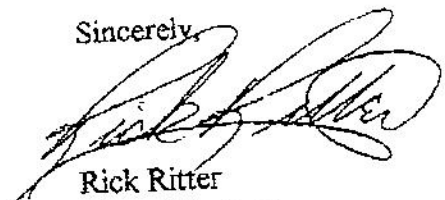
The Phosphorous content in the Watts Lagoon and the Illinois River were the same. Therefore, the Illinois River would not experience a negative environmental impact should the Watts Lagoon accidentally discharge.

Mr. Lyndon Black, Lab Technician for the Stilwell Area Development Authority, performed all tests according to Standard Methods for The Examination of Water and Wastewater, 18th Edition. They are as accurate as possible. As was stated earlier, the BOD tests for the Watts Lagoon and the Illinois River did not deplete the recommended 2.0 ppm. However, I do not believe that had the samples of BOD depleted the recommended 2.0 ppm that we would have noticed any significant difference compared with the actual. However, should the City of Watts decide that they require additional testing, seeding of samples will be done to ensure a depletion of at least 2.0 ppm.

I hope I have answered any questions that have arisen from the possibility of any contamination of the Illinois River should any accidental discharges of the Watts Lagoon occur.

If I or my department can be of any additional assistance to the City of Watts, please do not hesitate to call.

Sincerely,



Rick Ritter
Plants Manager